No. 14749

IN THE

United States

Court of Appeals

For the Ninth Circuit

GRIFFEN BUICK, INC.,
a corporation, and
J. W. NATION, *Appellants,*

vs.

LONDON EVANS, Administrator
of the Estate of GENERAL
GRANT GREER, JR., Deceased,
Appellee.

GRIFFEN BUICK, INC.,
a Corporation, and
J. W. NATION, *Appellants,*

vs.

LONDON EVANS, Administrator
of the Estate of
RUBBY GREER, Deceased.
Appellee

Appeal from the United States District Court
for the District of Arizona

APPELLANTS CLOSING BRIEF

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APPELLANTS CLOSING BRIEF

I

Defendants do not ask that this Court weigh the evidence presented. They ask merely that the Court exercise its prerogative to examine and ascertain whether there is any substantial evidence to support

the Findings of Fact, Conclusions of Law and Judgments entered. Failing to find such evidence the Court should then properly reverse the Judgments and enter judgment for the defendants and each of them.

Defendants cannot agree that the decision in the case of *Herron vs. Southern Pacific Co.* (1930), 283 U.S. 91, 75 L. Ed. 859, 51 S. Ct. 383, was in conflict with *Erie Railroad Co. vs. Tompkins* (1937) 304 U.S. 64, 78; 58 S. Ct. 817; 82 L. Ed. 1188, 1194; 114 A.L.R. 1487. The *Erie case* specifically overruled the case of *Swift vs. Tyson,* 16 Pet. 1; 10 L. Ed. 865, but failed to even mention the decision of the *Herron case.* It is also interesting to note the *Herron case* is directly in point on the very Arizona constitutional provision that plaintiffs raise.

The purpose and intent of Article 18, Sec. 5 of the Arizona Constitution is to reserve to a jury the existence or non-existence of contributory negligence. This provision does not purport to deal with a situation where a jury is waived. Even where a jury is present, the Arizona Supreme Court has consistently held that where the negligence of the plaintiff is the sole cause of an automobile accident, and there is no showing of negligence by the defendant, the question of contributory negligence is not a question of fact to be submitted to the jury and a directed verdict for the defendant should be entered. This, obviously, as a matter of law.

Texas-Arizona Motor Freight Inc. vs. Mayo, 70 Ariz. 323; 220 P. (2d) 227.

Motors Insurance Corp. vs. Rhoton, 72 Ariz. 416; 236 P. (2d) 839.

Citizens Utilities Co. vs. Firemen's Ins. Co., 73 Ariz. 299; 240 P. (2d) 869.

II

THERE IS NO EVIDENCE THAT DEFENDANT NATION VIOLATED ANY APPLICABLE STATUTORY REQUIREMENTS

Plaintiffs point to the stopping of defendant's tow truck on the highway, with only his park lights burning, as evidence of violation of Sections 66-173a. (When Lighted Lamps are Required) and 66-174g. (Lamps on Parked Vehicles) A.C.A. 1939, 1952 Cum. Supp., saying "Such conduct has been held to be negligence per se in similar cases," citing: *St. Johnsbury Trucking Co. vs. Rollins* (1950), 145 Me. 217; 74 Atl. (2d) 465, 466; *Winder & Son, Inc. vs. Blaine* (1940) 218 Ind. 68; 29 NE (2d) 987; *Herzberg vs. White* (1937), 49 Ariz. 313; 66 P. (2d) 253, 256, as evidencing this proposition. Each of these cases is clearly distinguished on the facts. The *St. Johnsbury case* involved no flares or fusees and there defendant's vehicle was upon the highway at night, during a snow storm, and completely unlighted although its lights were in good working condition. There were no headlights or danger signals present in the *Windsor & Son, Inc. case* and the defendant in that instance admittedly violated two specific statutory requirements which required the two front headlights to be lighted and two brilliant burning danger or caution signals to be placed along the highway. The *Herzberg case* has only one light of any sort involved. That was a surgical pencil flashlight directed toward the flat tire of the stopped automobile and there was no evidence of signal lights, warning flares or blinking headlights present there as there are in the case before this Court. None of these cases are authority for the claim that defendant Nation's acts were any evidence of a statutory violation.

It is true that the failure to comply with a proven statutory direction would be prima facie evidence of negligence. Such a failure alone would not be actionable unless proven to be the proximate cause of the ensuing injuries and damages.

Herzberg vs. White,
49 Ariz. 313; 66 P. (2d) 253.
Nichols vs. City of Phoenix,
68 Ariz. 124; 202 Pac. 201, 207.

Where the proximate cause of the injuries is one of a number of acts, none or only one of which could be charged to a defendant, there is nothing to submit to a jury because the only basis for the verdict would be guess or conjecture.

Central Arizona Light & Power Co. vs. Bell, 49 Ariz. 99; 64 P. (2d) 1249, 1255.

It is the plaintiff's burden to prove that any claimed negligence on the part of the defendant was the proximate cause of the injuries and the damages.

Nichols vs. City of Phoenix, 68 Ariz. 124; 202 P. (2d) 201, 208.

The record fails to show any such evidence or proof.

Plaintiffs contend (Brief for Appellee, pages 15 & 16) that the tow truck's headlights should have been burning and that by merely having the parking lights burning defendant Nation violated Section 66-173a. A.C.A. 1939, 1952 Cum. Supp. There is no such statutory requirement:

"66-173a. When lighted lamps are required.—Every vehicle upon a highway within this state at any time from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible persons and vehicles on the highway at a distance of 500 feet ahead shall display lighted

> lamps and illumniating devices as hereinafter respectively required for different classes of vehicles, subject to exceptions with respect to parked vehicles as hereinafter stated."

There is no requirement that headlights as distinguished from parking lights be burning, but only a requirement that "lighted lamps and illuminating devices" be used.

This section specifically excepted parked vehicles and plaintiffs seem to contend that defendant's tow truck was a parked vehicle, arguing that defendant Nation violated Section 66-173a. A.C.A. 1939, 1952 Cum. Supp., entitled, "Lamps on parked vehicles." This statute requires in subparagraph (b) only that parked vehicle

> "... be equipped with one (1) or more lamps which shall exhibit a white light on the roadway side visible from a distance of 500 feet to the front of such vehicle...".

In this regard there is no evidence whatsoever that the that the tow truck's parking lights did not comply with this requirement. Without such evidence it is presumed that such compliance was present. 31 C.J.S. Evidence, Sec. 1341, pages 769-772.

At sub-paragraph (c) the statute states, "Any lighted headlamps upon a parked vehicle shall be depressed or dimmed."

These two sub-paragraphs of the statute show that it comprehends the use of lights different from bright head lamps on parked vehicles and makes obvious that the purpose of the statute is to require stopped vehicles to use dimmed or weakened lights to distinguish them from moving vehicles which use bright driving lights.

Sub-paragraph (a) of this statute permits a vehicle to stop without showing any lights when there is suf-

ficient light to reveal any person or object within a distance of 500 feet. Nation testified that as he approached the disabled tractor trailer unit that it was visible without any lights for a distance of between 150 and 200 yards" (T 133). It was a starlight night with no clouds (T 70). These facts are neither disputed or questoned by inference. Under this state of the evidence the statute would require no lights whatsoever upon the stopped vehicles.

Plaintiffs concede that the tow truck would be permitted by Section 66-171 a. A.C.A. 1939, (1952 Cum. Supp.) to be stopped upon the highway to conduct proper towing operations but they argue that it was "practicable" for defendant Nation to stop elsewhere. By using the word "practicable" Section 66-171 A.C.A. 1939 (1952 Cum. Supp.) prescribes a very flexible standard and does not require a showing of "any imperative necessity of blocking the highway in the middle of the night in order to extricate the truck" (Brief of Appellee, page 18). It is the general rule that a party asserting the affirmative of an issue, in this case the statutory violation, has the burden of proving such a violation.

New York Life Ins. Co. vs. Stoner, (CCA 8th-1940) 109 F. (2d) 874, 876.

It is obvious why it was "practicable" and necessary for the tow truck to occupy a portion of the highway. The disabled tractor trailer unit was parallel to and approximately four feet north of the north edge of the pavement (T 54-56). If the tow truck pulled the disabled equipment directly to the rear of the unit, it could never have regained the highway, but would merely travel along the shoulder. It would be absolutely necessary to pull it in a southeasterly direction to regain

the pavement and of necessity the tow truck would have to be either upon or across the pavement to do so.

Plaintiffs attempt to infer impeachment of defendant Nation's testimony by saying (Brief of Appellee, page 17):

> "If, as Nation told Officer Cochran, the tractor was not disabled but was simply stuck in the sand (pp. 65) . . . there would appear to be no good reason why the tow truck had to block the westbound lane of the highway at the time of the accident."

While this statement is undoubtedly inadvertent, it is actually misleading and the very query is self-destructive. Defendant Nation's testimony established the disability of the tractor (T 88-89, Plaintiffs' exhibit 22 in evidence at page 6, lines 2-14 and page 9, lines 6-21), while Officer Cochran's testimony (T 65) was,

> "A. I asked what had happened, and he stated that he had been called to pull the semi out of the sand, that it got stuck off the road in the deep sand, and that he had attempted to pull it out in a southeasterly direction, but had succeeded in putting it deeper into the sand, and then had reversed the procedure, and had gone to the back of the semi-hooking onto the back of it, and watching it back, and had almost got it back out of the sand *where he could drag it back up on the road.*" (Emphasis added)

This testimony confirms rather than conflicts with defendant Nation's testimony and establishes that it was necessary (1) to free the tractor trailer from the sand, and (2) to "drag it back up on the road." This second action would be unnecessary if the tractor's engine were capable of operation.

It is claimed that defendant violated Section 66-182, A.C.A. 1939, 1952 Cum. Supp., which prescribes that

motor trucks shall carry certain flares and lanterns at night. Defendant wholly fails to see that this could be ascribed as any cause of the accident, much less a proximate cause.

Plaintiffs next advance Section 66-182a, relating to display of warning devices when a vehicle is disabled as a statutory violation by defendant Nation. It is admitted that no flare, fusee or reflector was placed along side the stopped equipment. However, this failure could in no way be a proximate cause of the accident. It would have been a futile effort in view of the fact that the location of the tow truck would have hidden it from the view of the Buick driver and would have been a futile effort since the lights on the rear end of the trailer (T 85, 96), together with the red boom light and the white boom light focusing on the rear end of the semi-trailer from the tow truck would have obliterated any vision of it by their concentrated brilliance.

Plaintiffs make no claim that the placement of the fusees to the east and to the west of the stopped equipment (T 90-91, 81, 82) fails to meet the statutory requirements. Rather, they complain that defendant Nation used red magnesium fusees instead of flares which are defined as "pot torches" by the statute.

The purpose and intent of the statute is to require a warning light to be placed at least 100 feet in each direction from the equipment and a warning light at the location of the equipment to notify other users of the highway of the presence of stopped equipment. This purpose and intent were fully met by defendant Nation.

Officer Cochran testified that red magnesium fusees were visible for one and one-half to two miles (T 85). It is common knowledge that the flame of a "pot torch" variety flare is not visible at such distances. Reflectors

are recognized by the statute as a substitute for flares ("pot torches"). Reflectors by their very nature, are not visible until activated by light striking them and they could not be activated until they were within the range of an approaching automobile's lights.

Defendant Nation's affirmative testimony established that a fusee and a reflector were in place (T 90-91, 81-82), burning and visible (T 137) 300 feet east of the stopped equipment immediately before the accident; and there were at least eight lighted lights on the rear of the semi trailer (T 85, 96); a red and white light from the boom of the tow truck were shining on the rear of the semi trailer (T 97, 199-101, 134) and the parking lights were lighted on the front of the tow truck. A fusee and reflector were placed 300 feet west of the equipment (T 97).

Plaintiffs attempt to meet this evidence by saying that Officer Cochran determined that no other type of warning, other than fusees were at the scene and that defendant Nation did not mention to the officer anything about putting out reflectors. The officer's testimony in this regard (T- 68-69) establishes only that he did not see any other type of warnings and that he recalls no mention being made to him relative to glass reflectors. However, Officer Cochran testified at the inquest, three days after the accident, and there said both Nation and Zekster (driver of the stalled equipment) had told him that "they had put out both flares and reflectors." The officer continued to state, "That is true in the sense that when I arrived they were out and they stated that they were out prior to the accident . . ." (Plaintiffs' Exhibit 22 in evidence, at page 8, lines 19-24). Again plaintiffs complain that defendant Nation was contradicted by the following testimony of Officer Cochran (T 67):

"Q. Did he state to you that the fusee burning at the time you arrived was the same one burning at the time of accident happened?

A. No. I believe that he stated that there had been two sets of fusees put out, and that the first one was the one that had been run over.

Q. I see.

A. By either the Buick that had run under the semi, or some car following close behind.

Q. When he referred to the fusees that had been run over, did he refer to the one that was out at the time of the accident on the eastern side of the point of impact?

A. Yes.

Q. Did you, Officer, make a search for the damaged or run-over fusee.

A. Yes, I did.

Q. Were you able to find any evidence of any damage to a run-over fusee?

A. I looked for it that night, and also went back the next morning to check the scene, and I could find no damaged flare."

This testimony establishes only that the officer failed to find a damaged flare. It does not define the area or the extent of the search. It points up the common interchangeable use of the words "flare" and "fusee." In this regard Cochran (T 69) states that defendant Nation may have been referring to a "reflector-type of flare" rather than a fusee that the Buick had run over and at the inquest defendant Nation testified when asked whether the Buick had struck any of the flares or reflectors,

"I don't know that. The driver went over the reflector. The other truck driver said he had to go over and straighten it up." (Plaintiffs' Exhibit 20, in evidence, page 18, lines 24-26).

Later Officer Cochran testified that the Buick had run over a highway department reflector, which was set in place one and one-half feet north of the edge of the highway, which denoted the edge of the road. This reflector was located approximately 35 feet east of the point of impact (T 69).

This entire testimony of Cochran was negative testimony and as such did not controvert or dispute the affirmative testimony of defendant Nation and did not constitute any evidence that the warning fusees and reflectors were not in place. *Juene vs. Del E. Webb Const. Co.,* 76 Ariz. 418; 265 P. (2d) 1076, 1079-1080.

The sufficiency of the warnings is established by the undisputed fact that other westbound automobiles saw and safely passed the towing operation (T 137) and by the further undisputed fact that Officer Cochran, well schooled in such matters, on his arrival, put out additional magnesium flares of the type commonly called "fusees." (T 83).

Plaintiffs have not only failed to point out any evidence that any of the alleged statutory violations were the proximate cause of the accident, but have failed to make any showing that defendant Nation violated any of the statutes.

III

DEFENDANT NATION FULFILLED HIS COMMON LAW DUTIES

Statements by the plaintiffs of the general rules of law applying to towing operations (Brief of Appellee, page 22) are not disputed. It is not negligence per se to use the highway in towing operations. The operator of a tow truck must use reasonable care in conducting operations that obstruct the highway. Defendant

Nation used such care. He placed a fusee and reflector 300 feet east of the stopped equipment at the point of the knoll, located where it would be visible to approaching westbound traffic for at least one and one-half miles in advance (T 85). The parking lights were burning on the tow truck (T 97). The rear end of the semi-trailer was brilliantly lighted (T 84-85, 96, 134-135). Defendant Nation utilized every means of warning that was available to him.

Plaintiffs query why the defendant did not send a man on down the road to warn traffic approaching from the east. The only testimony on this point is to the effect that the only other person present, the driver of the stalled equipment, had gotten into his truck at the beginning of the operation and was in the cab of that truck for the purpose of guiding and steering it during the towing operation (Plantiffs' Exhibit 20 in evidence, page 20, lines 1-6; Plantiffs' Exhibit 22 in evidence, page 37, lines 5-20).

The Coronor's jury did not infer that the driver of the stalled equipment "could have been sent down the road to warn vehicles coming from the east" and we submit that neither the District Court nor any reasonable person could draw any inference from this testimony other than it was necessary for that driver to be in the cab of his truck to steer the stalled equipment while it was being towed and that he was not free to be sent down the road as an additional warning measure.

Nor could the District Court properly find as a fact that Nation was negligent in failing to move the tow truck off the highway after realizing the Buick driver was apparently not aware of the dangerous situation being created. Again, the sole evidence was that there were not more than twenty (20) seconds available in

which to move the tow truck (T. 105) and Nation, entirely familiar with the somewhat complicated process necessary to release the winch mechanism so the tow truck's normal driving gears could be used (T. 141), did not, in twenty seconds, have sufficient time in which to so act and move the tow truck from the highway (T. 136).

Plaintiffs apparently now lean heavily upon the theory that defendant Nation used, or misused, his headlights in such a manner that the driver of the Buick automobile was mislead or induced into believing that the tow truck was merely an approaching vehicle moving normally along the highway and that such action entirely failed to give that driver warning of the presence of a stalled semi behind the tow truck.

Plaintiffs cite *Goodman vs. Keeshin Motor Express Co.,* (1934) 278 Ill. App. 227, in support of this theory. The only lights present in that case were the headlights of a stopped tow truck which were described as glaring headlights and which were pointed directly toward the approaching plaintiff, who saw nothing but these headlights and, receiving no other warning signal, passed to the right of the tow truck and collided with the unlighted tow.

If we ignore the evidence of the advance warnings given by means of the red fusee and reflector, the well-lighted rear end of the trailer and the blinking parking and headlights of the tow truck, then it might possibly be said that since the Buick left no skid marks and its wheels left tracks showing it ran off the north side of the highway a mere twenty (20) feet before reaching the tow truck (T81) the driver may have been misled into thinking the tow truck was "merely a lighted vehicle coming toward him" and have been induced to

try to pass to the right of that tow truck without any warning of the presence of the semi which was behind the lights and the tow truck.

If this view were assumed, then why would the Buick leave the pavement only 20 feet from the front of the tow truck? Why didn't the Buick actually drive to the right of the tow truck instead of colliding with it? There was no swerving on the part of the Buick (T101-102).

But such a view cannot be assumed in view of the undisputed evidence. Plaintiffs first complain that defendant Nation violated a statutory requirement by having only his parking lights burning and then argue that those parking lights caused the Buick driver to believe that the tow truck was normally driving along the highway. Had the tow truck's driving lights been on constantly, there would have been a somewhat different situation. But they were first burning on parking beam and then flashing back and forth between the driving beam and the parking beam (T 102).

The evidence further shows that there was warning of the obstruction (the semi-trailer) that was behind the tow truck. This was the large brightly lighted rear end of the trailer. Plaintiffs complain that defendant Nation should have swiveled the boom lights on the tow truck around so that they would shine on the highway directly into the face of the driver of the approaching Buick. Such an action would have diminished the amount of light shining on and lighting up the rear end of the trailer and, additionally, might well have given the appearance of a headlight on an automobile which was normally approaching. The use of the parking lights and the flashing of the parking and headlights could not reasonably be said to give such an impression.

If any trap was present in this situation it was due solely to the Buick driver's failure to drive within the range of his lights, *Krauth vs. Billar,* 71 Ariz. 298; 226 Pac. (2nd) 1012, and was created by the driver's excessive speed. There can be no recovery against defendants for damages so caused.

A claim of entrapment was recently made in *Lopez vs. City of Phoenix* (1954), 77 Ariz. 46; 268 P. 2d. 323, where the plaintiff alleged that the defendant City negligently permitted a trap to exist by maintaining a street that narrowed, or jogged, so that cars traveling on the street must turn slightly to continue along that street. The evidence there showed that the car in which the plaintiff was riding had been traveling at 65 to 70 miles per hour before it failed to make the jog, ran onto the parkway and collided with a pole. The Court held that the situation was apparent to any ordinarily prudent driver in the exercise of due care and that the defendant owed a duty only to a traveler in the exercise of due care who was making a lawful use of the highway, and found for the defendant.

In view of the evidence, together with the advance warnings by fusees and reflector, there is, as a matter of law, no evidence to support plaintiff's claim that defendant was in any manner negligent.

IV

THE ISSUES OF CONTRIBUTORY NEGLIGENCE OR IMPUTED NEGLIGENCE ARE PROPERLY BEFORE THE COURT.

The issues of the imputed negligence, contributory negligence and independent negligence of Ruby Greer, are properly before this Court, having been raised by the District Court's Findings of Fact IV, V and VI (T23-25), Conclusions of Law II (T 25), Defendant's

objections and exceptions to Findings of Fact, Conclusions of Law and Judgments (T 28) and defendant's Statement of Points, Points I, VII, VIII, XIII (T 42-43) filed in the District Court (T 43) and adopted before this Court (T 141).

In an action without a jury appellants may question the sufficiency of evidence to support the findings whether or not they have objected to findings in the trial court or whether or not they moved to amend them or made a motion for judgment. *Monagan vs. Hill* (CAA 9th) 140 F. (2d) 31, 33.

Defendants do not contend no one was driving the Buick. Officer Cochran testified at the inquest proceedings that General Grant Greer was the driver of the Buick (Plaintiff's Exhibit 20 in evidence, page 3, lines 23-25, and at page 5, lines 6-15), and this, being the only evidence, is conclusive and binding upon the defendants.

V

THE DRIVER OF THE BUICK WAS GUILTY OF NEGLIGENCE AS A MATTER OF LAW

It has been shown that where the plaintiffs' negligence is the sole cause of an automobile accident and there is no showing of negligence by the defendant, the Court should, as a matter of law, direct a verdict or enter judgment for the defendant.

The lights of the stopped trucks were visible for three-quarters of a mile to the east (T 85) and the red fusees visible for one and one-half to two miles and could be seen for at least three-quarters of a mile to the east. Sometime thereafter the red reflector, located in the center of the westbound traffic lane would become visible to the Buick driver when activated by the

Buick headlights. Hence, the driver had notice of a situation demanding caution at least three-quarters of a mile in advance of reaching the truck's location. Under these circumstances he could not assume that the road ahead was clear. *Nichols vs. City of Phoenix,* 68 Ariz. 124, 202 P. (2d) 201.

In view of these advance warnings he could not have been suddenly and unexpectedly confronted with the situation for the first time upon passing the knoll. If the driver "could not determine at first whether the lights were from an approaching vehicle or from one standing on the wrong side of the road" he had a duty to slow down and to have his car under such control as to be able to stop within the range of his vision, and not rush blindly on in the face of his doubt and the obvious warnings.

Nevertheless, the Buick driver continued to travel at a high speed (T 102), did not swerve (T101-102, 72), or apply the Buick's brakes (T 63). He was guilty of legal negligence. *Krauth vs. Billar,* 71 Ariz. 298, 226 P. (2d) 1012, 1015-1016; *Spang vs. Cote,* 141 Me. 338, 68 Atl. (2d) 823; *Dietz vs. Morris,* 98 Atl. (2d) 537.

Pleinis vs. Wilson Storage & Transfer Co. (1954), 66 N.W. (2d) 68, was a case in which there were no warning fusees but only lighted rear lights on a truck trailer that occupied decedent's side of the highway. Headlights of a second car along side the truck trailer faced the decedent. Both vehicles were stopped. Decedent approached and ran into the rear of the trailer. There were no marks on the pavement that indicated the brakes were applied on decedent's car. The front half of decedent's car was completely demolished. Although this case was tried under a comparative negligence issue, it was determined, as a matter of law, that decedent was negligent. The Court said, page 71:

"In this case the evidence fails to disclose that deceased saw the truck at any point, or that he ever slackened his speed or applied his brakes. He simply struck the truck 'full steam ahead'.

(4) Granting that the vision of deceased was made difficult by the lights of the Mauck car such condition would call for some diminution of speed or care on the part of the deceased, and record affirmatively shows neither diminution of speed nor application of brakes. It is apparent from the recited facts that if the lights of the Mauck car interfered with deceased's vision such interference must have existed for a space of time which would have permitted some action on the part of the deceased. To drive blindly on at the rate of speed deceased was traveling as disclosed by the physical facts, seems to us to be negligence which must be classified as something more than 'slight' ".

Plaintiffs speculated some length on what findings the District Court might have made (Brief of Appellee, pages 32-34). However, the District Court's findings are clearly set forth (T 18, 22) and the issue is whether the facts are undisputed or if in dispute, are of such potency that all reasonable men must reach the same conclusion, namely, that they do not support the findings, conclusions and judgments.

The alleged contradictions in defendant Nation's testimony do not exist. Nation, whose work included testing automobiles at high speeds (T 135), estimated the Buick's speed, not upon the high speed whine of the tires alone (T 136) but also upon the period of time it took the Buick to cover approximately onequarter of a mile (T 96, 102).

Nation's testimony at the trial that he saw the Buick three-quarters of a mile away in the darkness (T 96) obviously referred to the lights of the automobile. His testimony at the inquest, just as clearly referred to

seeing the Buick automobile itself (T 106-107, Plaintiff's Exhibits 20 in evidence, page 17, lines 9-15). At 150 yards, or 450 feet, the Buick would be just rounding the knoll and would be within the area of light cast by the lights of the tow truck and the semi and fusee.

The District Court did not find, and could not reasonably find, under the evidence, that there was no excessive speed. Apparently plaintiffs contend that without a prima facie daytime speed limit on Arizona highways the Buick could properly travel at top speed during the hour or hour and one-half after 4:25 p.m. and cover many of the 274 miles whether in the open country or driving through the City of Tucson. The ruling of the District Court on the proffered evidence, that an unidentified colored sailor stated to defendant Nation at the scene that the Buick had passed him prior to reaching the scene, when the sailor's car was doing 70 miles per hour, is not clear. It is to be noted, however, that Officer Cochran, at the inquest, testified:

> "No, there was a colored fellow there at the time I arrived who stated the Buick had passed him a few miles back but he left the scene and I had not been able to find him. He had not seen the accident but had seen the car before the accident" (Plaintiffs' Exhibit 20 in evidence, page 10, lines 21-25).

Disregarding all other evidence, the extensive damage to the Buick (Plaintiffs' Exhibits 2 thru 8, inclusive, in evidence) to the wrecker and the wrecker boom (T 71-73) and the semi trailer (T 75, Defendant's Exhibits A and B in evidence) could reasonably support no other finding than one of excessive speed.

It is undisputed that the presumption that decedents acted for their own safety would initially be present in this case. This presumption was overcome by the evidence that warnings were either not seen when they

should have been seen, or ignored; that the speed of the Buick was grossly excessive as evidenced by the damage done and the failure of the driver of the Buick to reasonably act to avert the collision. As it was said in *Pleinis vs. Wilson Storage & Transfer Co.,* 66 N.W. (2d) 68, 70:

> "that the deceased was negligent there was no doubt (citations). The physical facts disclosing the negligence of the decedent, the presumption that he was in the exercise of ordinary care disappears."

Further, it is incumbent upon the plaintiff to affirmatively show that defendant's negligence actually existed, not merely that it might have existed. Any presumptions as to defendant's negligence disappear where he denies negligence, and the burden then shifts to the plaintiff to produce affirmative evidence of negligence. *Seiler vs. Whiting* et al, 52 Ariz. 542, 84 P. (2d) 452. This the plaintiff did not do.

VI

LAST CLEAR CHANCE DOCTRINE DOES NOT APPLY

> "It must be kept in mind that the doctrine of last clear chance means just what the words imply and that the very essence of the rule is that it is applicable only where, notwithstanding another's negligence, the defendant, after realizing, or where under the circumstances he should have realized, that that other party cannot escape (due either to awareness or to physical inability, has a clear chance to avoid the accident by the exercise of ordinary care. It is an absolute "requirement of the doctrine of last clear chance that the peril of the party who relies upon it be inescapable or that he be oblivious to it.' " Deere vs. Southern Pac. Co. (1941) (CCA 9th) 123 F. 2d (438).

Decedents could have extricated themselves from their potential danger. Although the Buick was traveling at excessive speed it did not appear to be out of control but came straight down the highway (T 101-102). From the time it was one-half mile east, and continuing up to a point possibly 100 feet east of the scene, the Buick could have pulled over to the left side of the road to pass on the south of the trucks and thereby averted the collision. There was an unobstructed twenty-two and one-half feet of highway there (T 64). Other westbound cars had done so (T 137), and defendant Nation had a right to assume that the driver of the Buick would pay reasonable attention to the fusee, reflector and other lights and so act. Restatement of the Law, Torts, Section 480, Comment b.

The first time Nation believed the Buick driver might be unaware of the potential danger was when the Buick was approximately one-half mile distant (T 104). At that moment it was already too late for Nation to take the necessary action (T 136) to go to the rear of his truck, perform the necessary manipulations to take the winch motor out of operation, return to the truck and move it off the road prior to the arrival of the Buick (T 136, 141). Approximately twenty seconds later the collision occurred.

The defendant must, after having reason to realize the peril involved in plaintiffs' position, be negligent thereafter in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff. *Casey vs. Marshall,* 64 Ariz. 323, 168 P. (2d) 240, 64 Ariz. 260, 169 Pac. (2d) 184. From the moment the Buick was one-half mile distant and Nation realized the potential peril, he then had no existing ability to avoid the collision. From that moment on the driver of the Buick was the only person who had it

in his power to avoid the collision. Defendant Nation had neither the last chance, nor a clear chance.

VII

WILFUL AND WANTON MISCONDUCT IS NOT AN ISSUE

Plaintiffs apparently urge that Nation was wilfully and wantonly negligent upon the sole premise that defendant must show it was "necessary" to be upon the highway during the towing operation. It has been shown that Section 66-171 Arizona Code Annotated 1939 (1952 Cum. Supp.) contains a requirement of "practicable" instead of necessary. The general rule entitled the public to the use and aid of wreckers in returning cars to the highway and such wreckers are entitled to use and even obstruct the highways in the course of that operation when done in the exercise of reasonable care. *Ashe vs. Hughes,* 69 So. (2d) 210; *Duke vs. Mitchell,* 122 So. 81; 30 A.L.R. (2d) 1019, 1025.

The facts in *St. Johnsburg Trucking Co. vs. Rollins,* 145 Me. 311, 74 Atl. (2d) 465, are more consistent as an argument against wilful and wanton negligence being present in this case than they are for the plaintiff's contention. The wanton disregard present in the *St. Johnsburg case* was the defendant's failure to have any lights burning on his vehicle which was stalled on a highway, in a snow storm, at night, despite the fact that the lights were in working condition.

The technical definition of wanton negligence in Arizona is defined in *Barry vs. Southern Pac. Co.,* 64 Ariz. 116, 165 P. (2d) 825, which collects the prior cases and adopts the definition as set forth in Restatement of the Law, Torts, Section 500.

The Court has further defined wanton negligence in *Scott vs. Scott,* 75 Ariz. 116, 252 P. (2d) 571, 575, saying:

> "Wanton negligence is highly potent and when it is present it proclaims itself in no uncertain terms.— It is flagrant and evinces a lawless and destructive spirit."

Defendant Nation's efforts in placing warning signals, together with his entire course of conduct, conclusively show that his actions do not fail within these definitions under any view of the evidence.

Defendants submit to this Court that there is no evidence to support the Findings of Fact, the Conclusions of Law and Judgments, so that it was error for the trial court to have made such findings and conclusions and to have entered the judgments for plaintiff in each case.

Respectfully submitted,

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